2017

Administrative Rights in Institutional Perspective

Eloise Pasachoff
Georgetown University Law Center, eloise.pasachoff@law.georgetown.edu

Eloise Pasachoff, *Administrative Rights in Institutional Perspective*, 66 Duke L.J. Online 117-131 (2017).

Duke Law Journal Online

VOLUME 66 AUGUST 2017

ADMINISTRATIVE RIGHTS IN INSTITUTIONAL PERSPECTIVE

ELOISE PASACHOFF†

INTRODUCTION

Professor Karen Tani's essay for this symposium places in broader context the much praised and much maligned campaign against sexual assault in schools and universities that the Obama administration's Department of Education undertook over the course of its final five years.[1] The broader context, as she sees it, has two components: first, a historical one, about the rise in Congress and fall in the Supreme Court of the Violence Against Women Act, against the backdrop of insufficient state and local legal regimes punishing sexual violence; and second, an institutional one, about the potential limitations associated with federal administrative agencies articulating and vindicating novel rights. Both historical and institutional contexts are important, especially as the Trump administration prepares to undo the Obama administration's work,[2] for each offers a different way to identify the

† Professor of Law, Georgetown University Law Center. Thanks to the organizers of and participants in the 2017 Duke Law Journal Administrative Law Symposium for an enriching and engaging set of conversations; to Karen Tani, for providing this opportunity to respond to her important work; to the members of the *Duke Law Journal* for their work on this symposium volume; and to Marietta Catsambas, Georgetown Law '18, for helpful research assistance.

1. Karen M. Tani, *An Administrative Right To Be Free From Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847 (2017).

2. *See, e.g.*, Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html [http://perma.cc/5WMP-V2XU]; Nick Anderson, *Under DeVos, Education Department Likely To Make Significant Shift on Sexual Assault*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/under-devos-education-

challenges and opportunities that lie ahead. My short response focuses largely on Tani's institutional concerns and circles back to her historical lens at the end.

Tani identifies three potential limitations associated with administratively created rights in general, not solely in the context of the recent administrative expansion of Title IX[3]: they may be weaker because they are "filtered, or mediated," through regulated entities;[4] because they are "more vulnerable to change than other forms of lawmaking"; and because they "tend to implicate only pockets of the population that might wish to claim the right."[5] I agree that these limitations are present in administrative rights, but I am less certain than Tani is that these limitations "flow[] from the limitations of the agencies themselves."[6] Instead, I think that these limitations are associated with rights shaped by Congress and courts as well, as the rest of this response elaborates.

My expansion of Tani's tripartite description of limited rights leads me to the same conclusion as Tani, though: those who wish to expand the nature of American citizenship to see all people as rights-bearing individuals will continue to pursue those claims "in whatever forum is available."[7] I simply want to suggest that the agency as a forum for rights claims is no worse, but also no better, than other potential fora. Taking the long view, as Tani invites us to do, this equivalence matters.

I. MEDIATED RIGHTS

Tani first observes that "for agency-articulated rights[,]… rights claims proceed first, and perhaps only, through a regulated institution

---

department-likely-to-make-significant-shift-on-sexual-assault/?utm_term=.28262b4a1f78 [http://perma.cc/4B5E-XRB5].

3. Education Amendments of 1972, Pub. L. No. 92–318, tit. IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1686 (2012)). Title IX's core prohibition states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," with nine statutory exceptions that are either contexts to which the core prohibition does not apply, such as admissions to private undergraduate colleges, or institutions to which the core prohibition does not apply, such as "[e]ducational institutions of religious organizations with contrary tenets," and non-profit fraternities, sororities, and Boy or Girl Scouts. 20 U.S.C. §§ 1681(a)(1)–(9).

4. *See* Tani, *supra* note 1, at 1854, 1886.

5. *Id.* at 1854.

6. *See id.* at 1883.

7. *Id.* at 1903.

rather than through the agency itself," let alone through a court.[8] In other words, the right is "filtered, or mediated," through a decisionmaker other than the agency—in the Title IX context, an educational institution.[9] How well do mediated rights work? Tani wonders, and invites future scholarship to study this and related questions. Do the mediating institutions take rights claims seriously?[10] Do they treat complainants fairly?[11] Do they shape rights-holders—here, their students—to see themselves as rights-holders?[12] Or do they construe rights narrowly and change their practices symbolically (if at all) just to avoid claims rather than in any deep sense?[13]

These are excellent questions worthy of exploration. But institutionally mediated rights are not solely a feature of agency-created rights. Many statutory rights articulated by Congress bear this feature as well. Tani actually provides an example of this fact in her analogy to the way Title VII's statutory (not agency-created) ban on workplace discrimination is largely mediated through "employers' internal dispute resolution processes" rather than "through formal legal channels" like agencies or courts.[14]

Other examples abound. Consider the congressionally articulated right of children with disabilities to a "free appropriate public education" under the Individuals with Disabilities Education Act.[15] It, too, is mediated through tens of thousands of schools nationwide.[16] The same concerns Tani raises about how well mediated rights function under the Department of Education's articulation of the right to be free from sexual violence are also implicated in mediated rights under the IDEA.[17]

---

8. *Id.* at 1886.

9. *Id.*

10. *See id.* at 1886–88 ("Beyond scattered anecdotes, however, it is unclear whether institutions now vindicate such claims more frequently than before.").

11. *See id.*

12. *See id.* at 1886–89.

13. *See id.* at 1886–91.

14. *Id.* at 1889.

15. 20 U.S.C. §§ 1400(d)(1)(A), 1401(9), 1412(a)(1) (2012).

16. *See, e.g.*, Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1421–23 (2011) (describing the way the rights created by the IDEA are implemented at the local level through schools, with oversight by school districts, states, and the Department of Education, leaving enforcement of those rights largely in the hands of parents).

17. The literature on schools' IDEA compliance and noncompliance is voluminous. For a compelling study of both federal and state cases against school districts for noncompliance with the IDEA, describing how some schools treat students with disabilities who protest their

Questions about the utility of mediated rights also exist when it is courts rather than agencies that expound upon a statutorily created right. For example, consider the complex fate on the ground of the Supreme Court's articulation of various rights under Title IX, such as the right to be free from sexual harassment by teachers[18] and peers[19]—the very precedents that laid the legal groundwork for the Obama Department of Education's sexual violence analysis.[20] Tani's questions about the utility of mediated rights apply in the judicially interpreted context as well.[21]

Nor are mediated rights a function of statutory rights only; they can also stem from constitutional provisions. Putting the Supreme Court's desegregation cases alongside the contemporary reality of racially isolated schools nationwide provides a sobering example of the limitations associated with constitutional rights being mediated by implementing educational institutions.[22] *Brown v. Board of Education*[23] may have announced a resounding principle—"We conclude that in the field of public education the doctrine of 'separate but equal' has no place"[24]—but school systems engaging in massive resistance hardly embraced it.[25]

Rights claims that must be mediated through or otherwise implemented by an institution, rather than being fully realized by the announcement of the right itself, raise a host of important questions about their limitations, as Tani rightly sets forth—but these limitations are not a result of the limitations of the agencies that might be involved.

---

education and how some schools attempt to comply only with the law's minimal procedural requirements, see RUTH COLKER, DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2013).

18. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

19. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).

20. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleagues (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/6LNG-UJBE] (citing Davis and Gebser).

21. *See* Tani, *supra* note 1, at 1861–62 (noting the limitations in practice of *Gebser* and *Davis*).

22. *See, e.g.*, Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education*, 81 N.C. L. REV. 1597 (2003) (describing limits, both doctrinal and practical, of the Supreme Court's desegregation doctrine).

23. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

24. *Id.* at 495.

25. *See, e.g.*, JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART 21–117 (2010) (describing resistance to school integration).

II. CHANGEABLE RIGHTS

Tani's second concern is that "rights that emerge from the modern administrative state" have "flexibility and mutability" as "a defining feature," in contrast to the "durability" we associate with the Constitution ("difficult to change") and courts ("bound by precedent").[26] She asks whether administrative rights are therefore more vulnerable.[27] Even if institutions retain certain structural features encouraged by the initial requirements of these rights, might those structures be hollowed out over time, especially (but not only) if the new presidential administration changes course?[28] On the other hand, she observes, perhaps agency-articulated rights are a function of agencies following cultural change rather than leading it, thereby muting concerns about any formal change brought about by the new administration.[29] As with her development of questions about mediated rights, Tani invites research on these questions about changeable rights.

Once more, I embrace the questions Tani asks while posing them more broadly to rights emanating from Congress and the courts as well. Congress changes rights with some regularity, whether in response to court decisions[30] or not,[31] and to expand rights[32] as well as to contract

---

26. *See* Tani, *supra* note 1, at 1891.

27. *See id.* at 1892.

28. *See id.* at 1891–92.

29. *See id.* at 1897.

30. *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 5 (overruling *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2(b)(2), 122 Stat. 3553, 3554 (identifying purpose of the Act as "reject[ing]" various Supreme Court cases limiting the scope of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012)); Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (identifying purpose of the Act as responding to recent Supreme Court decisions limiting the scope of protection under civil rights laws); Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796, 796 (providing that parents who are prevailing parties in suits under the Education of the Handicapped Act, 20 U.S.C. §§ 1400–1482 (2012), may recover attorneys' fees, overruling Smith v. Robinson, 468 U.S. 992 (1984)).

31. The Patient Protection and Affordable Care Act is a notable recent example of Congress expanding rights unprompted by a court ruling. *See* Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 U.S.C.).

32. For examples of statutes that expanded rights that the Supreme Court had contracted, see *supra* note 30.

them.[33] So, too, do courts, whether by directly overruling prior cases[34] or by simply reinterpreting those prior cases.[35] In engaging in reinterpretation, in fact, courts may play a powerful role in "conversion"—the phenomenon Tani discusses under which "political actors are able to redirect institutions or policies to new ends"—a phenomenon that Tani connects only to administrative rights such as the sexual assault framework set forth by the Department of Education.[36] If "institutional ambiguity," or "the condition of having 'multiple, noncomplementary logics or goals,'" is a "circumstance that appears to enable conversion,"[37] then open-ended constitutional pronouncements seem especially ripe for conversion, rather than this phenomenon being limited to rights set forth by agencies.[38]

Moreover, the extent to which administratively created rights are easy to change somewhat depends on the agency's choice of

33. Efforts (thus far unsuccessful) to unwind the Affordable Care Act fall into this category. *See, e.g.*, Robert Pear & Thomas Kaplan, *Senate Rejects Slimmed Down Obamacare Repeal as McCain Votes No*, N.Y. TIMES (July 27, 2017), https://www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html [http://perma.cc/Y4TB-N34J] (describing narrow 49-51 defeat of Senate effort to repeal the Affordable Care Act); *see also* American Health Care Act of 2017, H.R. 1628, 115th Cong. (2017) (attempting to repeal the Affordable Care Act, *supra* note 31); Restoring Americans' Healthcare Freedom Reconciliation Act, H.R. 3762, 114th Cong. (2015) (same). Other examples exist, especially where competing rights come into conflict. *See, e.g.*, Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (limiting certain abortion rights in favor of the fetus); LAURA K. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 4 (2016) (describing how legislative reactions to terrorist attacks undermine Americans' Fourth Amendment rights).

34. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).

35. *Compare, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) (plurality opinion) ("Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. . . . The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."), *with id.* at 799 (Stevens, J., dissenting) ("The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court's most important decisions." (footnote omitted)).

36. Tani, *supra* note 1, at 1895.

37. *Id.* at 1896.

38. What, for example, does "equal protection" mean? What does "in the field of public education the doctrine of 'separate but equal' has no place" mean? Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). *Compare Parents Involved*, 551 U.S. at 754–82 (Thomas, J., concurring) (interpreting equal protection holding of *Brown*), *with id.* at 823–845 (Breyer, J., dissenting) (rejecting that interpretation).

policymaking form.[39] Tani notes that the Department of Education's campaign against sexual violence has been set forth largely via "informal guidance, as contrasted with binding, notice-and-comment rulemaking."[40] Formal regulations that become entrenched are much harder to change than mere guidance[41]—not impossibly so, of course, but still, it is worth underscoring that administratively created rights may look easier to change than those created by Congress or fleshed out by courts only when agencies choose to make them easier to change.

It is true, as Tani notes, that enforcement of rights is an aspect of agency action that is especially prone to changing as different administrations shift gears.[42] At the same time, courts and Congress have a role to play in enforcement changes as well. Agency enforcement capacity and direction is in part a function of the size and allocation of the budget Congress gives it to enforce.[43] Congress can further constrain or expand the direction of agency enforcement through appropriation riders.[44]

Courts, too, change the dimension and scope of enforcement opportunities. Consider, for example, the Supreme Court's decision in *Alexander v. Sandoval*,[45] which blocked private parties from bringing lawsuits alleging discrimination on the basis of disparate impact under Title VI of the 1964 Civil Rights Act, leaving disparate impact claims available only in agencies.[46] Similarly, the Court's decision in

---

39. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1394–96 (2004).

40. *See* Tani, *supra* note 1, at 1893.

41. For example, the Title IX regulation governing athletics has been on the books essentially unchanged for decades. 34 C.F.R. § 106.41 (2016); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (rejecting the principle that "an agency must use the APA's notice-and-comment procedures when it wishes to issue a new *interpretation* of a regulation that deviates significantly from one the agency has previously adopted" (emphasis added)); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513–16 (2009) (discussing the "arbitrary or capricious" standard of judicial review of agency decisions to change course in a regulation promulgated under notice-and-comment).

42. *See* Tani, *supra* note 1, at 1892–93.

43. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: 2005, at 4 (2004) http://www.usccr.gov/pubs/crfund05/crfund05.pdf [https://perma.cc/F2CE-FCZB] (comparing the President's budget request for enforcement activities in various civil rights agencies with Congress's actual appropriations).

44. *See generally* Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456 (describing and critiquing this process).

45. Alexander v. Sandoval, 532 U.S. 275 (2001).

46. *Id.* at 293.

Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources[47] limited the circumstances in which a prevailing plaintiff could obtain attorneys' fees.[48] These opinions, part of what Professor Pam Karlan identifies as the judicial trend of "disarming the private attorney general,"[49] function as rights limitations because they limit private enforcement.

Tani's query of whether agencies are actually following cultural change rather than instigating it in announcing new rights has a similar parallel in courts and Congress. For example, when the Supreme Court announced that gay and lesbian couples have a fundamental right to marry, the Court relied in part on the numerous state courts and legislatures that had previously articulated the same right and had already allowed those couples to adopt children.[50] The action of state courts and legislatures banning the death penalty for juveniles was also important to the Supreme Court in its decision holding that the death penalty for juveniles violates the federal Constitution.[51] Indeed, as Professor David Cole's recent work on citizens as "engines of liberty" shows more generally, courts often reinterpret constitutional rights in response to groundwork laid by citizens demanding change.[52]

It might be less surprising to see Congress as a body that follows rather than leads, given its majoritarian role in our representative democracy. But even in instances where one might think Congress is leading—such as passing amendments to the Constitution to prompt a shift in our national compact—there is powerful evidence that they are not leading at all. As Professor David Strauss has argued, "when [constitutional] amendments are adopted, they often do no more than ratify changes that have already taken place in society without the help

47. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598 (2001).

48. *Id.* at 600.

49. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 ILL. L. REV. 183, 183.

50. Obergefell v. Hodges, 135 S. Ct. 2584, 2600, 2611 (2015) (showing that "[m]ost states have allowed gays and lesbians to adopt," and attaching an appendix listing "State Legislation . . . Legalizing Same-Sex Marriage").

51. Roper v. Simmons, 543 U.S. 551, 564, 579, 580 (2005) (showing that "30 States prohibit the juvenile death penalty" and attaching an appendix comparing "states that permit the imposition of the death penalty on juveniles" with "states that retain the death penalty, but set the minimum age at 18").

52. DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 6, 9 (2016).

of an amendment. The changes produce the amendment, rather than the other way around."[53]

At bottom, then, rights stemming from agency action are surely changeable, as Tani observes, but they are not uniquely so; rights announced by the courts and Congress are, too. Tani's research questions are important but apply to these other institutions as well.

III. INCOMPLETE RIGHTS

Tani's last concern about agency-created rights is their "incompleteness," which she calls "perhaps [their] most important aspect," and which she attributes to "the incompleteness of agencies' jurisdictions."[54] Title IX may serve tens of millions of students, as Tani points out, but it is not universal, leaving out those who are not currently enrolled at an educational institution receiving federal funds—that is, most of America. "Such jurisdictional limits raise equality concerns," she rightly notes, "rais[ing] the prospect of a 'dual system' of sexual assault law: one for relatively elite, educated young adults (the people who appear to be the prime beneficiaries of OCR's current campaign) and the other for everyone else."[55] A further problem with incomplete rights, Tani observes, is that "agencies, or even different branches of the same agency, may adopt varying approaches to the same basic right," meaning that "some administrative constituencies thus may have weaker rights than others."[56]

Here, too, I embrace Tani's questions and observations but seek to expand them to courts and Congress as well. Incomplete rights are not just a feature of those created by an agency, nor are the jurisdictional limits of agency-created rights necessarily associated with the reality of partial agency jurisdiction. Even assuming that agencies do nothing more than effectuate the plain text of the statutes delegated to their authority by Congress, the rights would be incomplete for one simple reason: Congress has created incomplete rights.[57] This would be true whether or not there is any agency involved whatsoever.

---

53. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001).

54. Tani, *supra* note 1, at 1897.

55. *Id.* at 1898.

56. *Id.*

57. The differences in the rights to be free from sexual violence that Tani analyzes for the different "administrative constituencies" of the Department of Education, the Department of

So, for example, Title VI prohibits discrimination on the basis of race, color, or national origin—but not sex or gender—by any institution receiving federal funding.[58] Title VII includes sex as among the prohibited classes of discrimination—but applies only to unlawful employment practices, not in any other context.[59] Title IX prohibits discrimination on the basis of sex—but applies only to education programs and activities that receive federal funding, not to any other kind of program or activity, and excludes a slew of educational institutions and types of pursuits from its scope.[60] Moreover, although there is a strong textual argument that Titles VII and IX both should be read to include sexual orientation[61] and gender identity[62] as part of prohibited discrimination on the basis of sex, neither of those laws spells out that inclusion explicitly. For that matter, non-federal human rights laws specify a wide range of other protected classes that are entirely absent from federal antidiscrimination law,[63] rendering the federal civil rights regime comparatively "incomplete." None of these rights needs to have anything to do with an agency to be either real or incomplete.

Moreover, the statutory framework of discrimination might itself be incomplete. What if the true barriers to full inclusion in society involve government-funded or -provided services or opportunities

---

Defense, and various correctional authorities, *id.* at 1899, may not stem as much from the differences in the agencies' approaches as much as they do from the different statutes that create the rights in question.

58. 42 U.S.C. § 2000d (2012).

59. *Id.* § 2000e-2(a).

60. *See* Anderson, *supra* note 2.

61. *See, e.g.*, Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 343–51 (7th Cir. 2017) (en banc) (holding that sexual orientation discrimination is sex discrimination under Title VII); Christiansen v. Omnicom Group, Inc., 852 F.3d 195, 201–07 (2d Cir. 2017) (Katzmann, J., concurring) (finding persuasive three different arguments rooted in the text of Title VII for holding sexual orientation discrimination to be sex discrimination under Title VII); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1158–61 (C.D. Cal. 2015) (holding that sexual orientation discrimination is sex discrimination under Title IX).

62. Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034, 1046–50 (7th Cir. 2017) (analyzing Title IX's application to claims of sex discrimination based on a student's transgender status and holding that plaintiff had established a likelihood of success on the merits of such a claim); Smith v. City of Salem, 378 F.3d 566, 571–75 (6th Cir. 2004) (holding that discrimination on the basis of transgender status is sex discrimination under Title VII); Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, *5–*11 (Apr. 20, 2012) (holding that discrimination on the basis of transgender status is sex discrimination under Title VII).

63. *See, e.g.*, Human Rights Act of 1977, D.C. CODE ANN., §§ 2-1401.01–2-1404.04, 2-1411.01–2-1411.06 (2016) (including "marital status," "personal appearance," "family responsibilities," and "political affiliation" as protected classes).

rather than precatory and vague rights?[64] And then what if Congress decides to make these services or opportunities available only to a subset of the population?[65] The problem of incomplete rights is not simply related to agencies' limited jurisdiction, but rather to the political and social context driving what Congress deems worthy of including as a right at all.

Courts also play a role in creating and furthering the existence of incomplete rights. Tani gives examples of agencies' varying interpretations of equal protection guarantees,[66] but of course the same can be true of courts, even after the Supreme Court resolves differences among the lower courts. On the face of the Equal Protection Clause,[67] for example, it is not obvious that the standard for assessing whether a governmental action has denied a person equal protection of the laws should vary depending on whether the governmental action involves merely the regulation of business (rational basis review)[68] or instead involves distinctions on the basis of disability (rational basis with bite),[69] sex (intermediate scrutiny review),[70] or race (strict scrutiny review).[71] These variations create

64. *See, e.g.*, Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 34 (2004) (describing the multiple "barriers—the lack of access to personal-assistance services, accessible technology, home modifications, and accessible transportation, together with the structure of our health care system—[that] operate to keep many people with disabilities out of the workforce well before any individual employer has an opportunity to discriminate against them"); *cf.* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736–37 (2003) (upholding the family leave provision of the Family and Medical Leave Act, 29 U.S.C. §§ 2612(a)(1)(c)(2012), a "routine employment benefit," as valid legislation under Section 5 of the Fourteenth Amendment, because Congress "had already tried unsuccessfully to address" through Title VII the problem of "mutually reinforcing stereotypes" about women's and men's domestic interests and capacities).

65. *Cf.* Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 640–41 (1992) (suggesting that the "free appropriate public education" guaranteed by statute to children with disabilities ought to be expanded to provide the same guarantee to all children).

66. Tani, *supra* note 1, at 1897–99.

67. U.S. CONST. amend. 14, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). For a discussion of agency and Supreme Court interpretations of how the Equal Protection Clause applies to different groups, see Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L.J. 1807 (2017).

68. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955).

69. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

70. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996).

71. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (plurality opinion); *id.* at 800 (Stevens, J., dissenting) ("The Court's misuse of the three-tiered approach to equal protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution."); *id.* at 829–30 (Breyer, J., dissenting) (arguing for a less

"incomplete rights" for what we might call different "constitutional constituencies," just as Tani suggests exist for different "administrative constituencies."[72] For example, under certain circumstances, a public school can probably decide to admit only boys while excluding girls,[73] but a public school may not decide to admit only white children while excluding children of color (at least as a formal matter).[74]

Meanwhile, in principle, presidential control could provide a counter for varying agency rights, reading different statutes to align under the banner of a coherent centralized stance. This is, in fact, part of the job of the Office of Information and Regulatory Affairs—"to identify and convey interagency views and to seek a reasonable consensus."[75] Other parts of the Office of Management and Budget can play similar unifying roles.[76] It is likely not coincidental that disparate agencies in the Obama administration defined prohibitions against discrimination on the basis of sex in different statutes to preclude

strict standard of scrutiny of racial measures designed "to bring the races together" rather than "to keep the races apart").

72. Tani, *supra* note 1, at 1898.

73. *See, e.g.*, Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 2018–34 (2006) (applying intermediate scrutiny to differently structured single-sex schools and arguing that certain structures are permissible); Rosemary Salomone, *Rights and Wrongs in the Debate over Single-Sex Schooling*, 93 B.U. L. REV. 971, 987 (2013) ("No federal court to date has affirmed, in a decision on the merits, the proposition that single-sex programs constitute per se violations of either Title IX or the Equal Protection Clause.").

74. The qualification is important, given the facts on the ground. *See, e.g.*, Chemerinsky, *supra* note 22, at 1609 (describing the state of racial separation in the nation's schools).

75. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1841 (2013); *see also id.* at 1873–74 ("Those involved in the OIRA process are alert to the concerns and priorities of the President himself, and they take direction from him.").

76. Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2246–47 (2016) (describing the importance of OMB's Resource Management Offices in coordinating policies for the executive branch).

discrimination on the basis of gender identity.[77] The Trump administration seems to be unifying in a different direction.[78]

I agree with Tani that we ought to pay attention to and worry about incomplete rights. At the same time, we should acknowledge that this country was founded on the notion of inalienable rights that were, from the first moment of their announcement, incomplete, long before the rise of the administrative state.[79] Whether agency-created, congressionally determined, or judicially divined, the existence of incomplete rights lines our nation's march toward a more perfect union.[80]

---

77. *See, e.g.*, Letter from Catherine Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Colleague (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/4FJF-XE48] (setting forth the Department of Justice and Department of Education's views on the law's protection for transgender students in schools); 45 C.F.R. § 92.4 (2016) (promulgating Department of Health and Human Services rule defining "gender identity" as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth"); Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, *5–*11 (Apr. 20, 2012) (Equal Employment Opportunity Commission opinion setting forth interpretation of Title VII as prohibiting discrimination on the basis of gender identity).

78. Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., and T.E. Wheeler II, Acting Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Colleague (Feb. 22, 2017), https://www.justice.gov/opa/press-release/file/941551/download [https://perma.cc/5D2B-H7QN] (withdrawing the Obama administration's guidance documents supporting transgender rights).

79. Consider Lin-Manuel Miranda's portrayal of one aspect of these incomplete rights: "We hold these truths to be self-evident that all men are created equal," Angelica Schuyler sings, adding, "and when I meet Thomas Jefferson, I'm 'a compel him to include women in the sequel!" LIN-MANUEL MIRANDA & JEREMY MCCARTER, HAMILTON: THE REVOLUTION 42 (2016); *see also* Declaration of Sentiments, Seneca Falls Convention (July 19, 1848), http://www.womensrightsfriends.org/pdfs/1848_declaration_of_sentiments.pdf [https://perma.cc/XA6A-XVWL] ("[I]n view of this entire disfranchisement of one-half the people of this country, their social and religious degradation,—in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of these United States."). Or, more chillingly, consider the Supreme Court's infamous declaration in *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857), that, whether free or enslaved, African-Americans "had no rights which the white man was bound to respect," notwithstanding the heady rights-creating language of the Declaration of Independence and the Constitution.

80. *Cf.* Barack Obama, Remarks by the President at the 50th Anniversary of the Selma to Montgomery Marches (Mar. 7, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/03/07/remarks-president-50th-anniversary-selma-montgomery-marches [https://perma.cc/6WCB-MFVC] ("What greater expression of faith in the American experiment than this, what greater form of patriotism is there than the belief that America is not yet finished, that we are strong enough to be self-critical, that each successive generation can look upon our imperfections

CONCLUSION

What ultimately emerges from Tani's essay is the sense that agencies are no better but also no worse in the construction of rights than our other democratic institutions are—they have similar limits and similar opportunities. This is a valuable lesson at a moment of widespread reconfiguration of government and vast political realignment. As her historical analysis of the long struggle toward a right to be free from sexual violence demonstrates, different "pockets of the state, such as particular administrative agencies" are no strangers to "pioneering new rights claims or salvaging rights claims that have been gained and lost in other venues."[81] Tani's work thus invites us to consider what other "pockets of the state" beyond administrative agencies might be in play, as the Department of Education's campaign against sexual violence likely comes to an end in the new administration.

From this perspective, just because the Department of Education stepped up to take on sexual violence where other institutions had previously failed does not forever condemn those other institutions as irrelevant or lost.[82] For example, state and local arenas may take on renewed importance as the Trump administration's agencies turn away from recognizing and enforcing rights claims.[83] Federal courts have a slew of doctrinal avenues available to them to check over-politicized agency action.[84] Congress, too, may reach a tipping point, either because the current Republican-controlled Congress will push back against the Trump administration's agencies or because a subsequent

---

and decide that it is in our power to remake this nation to more closely align with our highest ideals?").

81. *See* Tani, *supra* note 1, at 1902.

82. Of course, as Tani wisely notes, one can appreciate the "power and appeal" of the Department of Education's role in addressing sexual violence "[w]ithout trivializing" the "due process, legitimacy, and accountability concerns" connected to the specific actions it decided to take in addressing this important issue. *Id.* at 1852.

83. *See, e.g.*, Heather Gerken, *We're About to See States' Rights Used Defensively Against Trump*, VOX (Jan. 20, 2017, 2:14 PM), http://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative [https://perma.cc/E2NV-8JPZ]; Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY (Spring 2012), http://democracyjournal.org/magazine/24/a-new-progressive-federalism/ [https://perma.cc/9DUG-4VMB].

84. For a discussion of some of these avenues, see, for example, Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 ("Expertise-forcing is the attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures, even or especially political pressures emanating from the White House or political appointees in the agencies.").

election cycle will eventually bring a different majority to power.[85] Different, perhaps surprising, institutions may yet emerge as standard-bearers for rights, from teachers' unions working with school boards[86] to private auditors of federal funding recipients.[87]

What exactly these pockets of the state may be, and what rights claims may yet be salvaged through them, are as yet unknown. But I strongly agree with Tani's final conclusion: continued pursuit of the ideals of expanded and inclusive citizenship and governance is inevitable.[88]

---

85. *See, e.g.*, Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 675 (1992) ("[C]onsistent with the very idea of the system of checks and balances that comprises the separation of powers, the executive and Congress are involved in a healthy, ongoing tug of war over control of administrative agencies."); *see also* Kristina Peterson & Richard Rubin, *Donald Trump and Republicans Strain to Agree on Agenda*, WALL STREET J. (Jan. 26, 2017, 7:45 PM), https://www.wsj.com/articles/trump-lays-out-policy-vision-to-congressional-republicans-1485463114 [https://perma.cc/V7UU-NGMA].

86. *See, e.g.*, Francisco Vara-Orta & Corey Mitchell, *As Trump Weighs Fate of Immigrant Students, Schools Ponder Their Roles*, EDUC. WEEK (Jan. 26, 2017, 6:07 PM), http://blogs.edweek.org/edweek/learning-the-language/2017/01/as_trump_weighs_fate_of_immigr.html?qs=unions+undocumented+students [https://perma.cc/D256-9DCB] (describing collaboration between unions, school superintendent, and a children's advocacy group to protect undocumented students); *AFT Resolution: Support of the Rights of Transgender Persons—AFT Stands In Unity Against Discrimination in North Carolina and Mississippi*, AM. FED'N OF TEACHERS (2017), http://www.aft.org/resolution/support-rights-transgender-persons-aft-stands-unity-against-discrimination [https://perma.cc/Q778-V4Q3] (resolving to work with school districts on policies that include protections for transgender and gender nonconforming students); Sabrina Holcomb, *Schools on Front Lines in Nationwide Movement To Protect Undocumented Students*, EDUC. VOTES (Jan. 14, 2017), http://educationvotes.nea.org/2017/01/14/schools-front-lines-nationwide-movement-protect-undocumented-students/ [https://perma.cc/JTH7-UHLQ] (describing work of National Education Association to protect undocumented students).

87. In a current work-in-progress, for example, I explore substantive commitments woven throughout the seemingly technical rules placed on federal funding recipients, which outside auditors regularly review. Eloise Pasachoff, *Money Rules: Federal Spending and Intergovernmental Relationships* (on file with the *Duke Law Journal*) (discussing Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78,590 (Dec. 26, 2013) (codified at 2 C.F.R. ch. I & ch. II, pts. 200, 215, 220, 225 & 230), and OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-133, COMPLIANCE SUPPLEMENT (June 2016), https://www.whitehouse.gov/omb/circulars/a133_compliance_supplement_2016 [https://perma.cc/HK2J-944T])).

88. *See* Tani, *supra* note 1, at 1902–03.